UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DAVID BROWN,

Petitioner,

— against —

UNITES STATES OF AMERICA,

Respondent.

11-cr-564 (ARR)
16-cv-807 (ARR)

NOT FOR PRINT OR ELECTRONIC PUBLICATION

OPINION & ORDER

ROSS, United States District Judge:

Petitioner, David Brown, brings this petition under 28 U.S.C. § 2255 to vacate, set aside, or correct his conviction under 18 U.S.C. § 924(c)(1)(A) on the grounds that Hobbs Act robbery does not qualify as a crime of violence as defined by that statute. For the reasons that follow, I deny Mr. Brown's § 2255 petition.

BACKGROUND

On April 5, 2012, Mr. Brown pleaded guilty to Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), and unlawful use and brandishing of a firearm in relation to that robbery, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). Criminal Cause for Pleading, ECF No. 28; Indictment 1-2, ECF No. 13. On April 29, 2015, I sentenced Mr. Brown to six months of incarceration on the Hobbs Act robbery charge and the statutory minimum of 84 months of incarceration on the unlawful use of a firearm charge, to run consecutively for a total of 90 months' imprisonment. J. Crim. Case 2, ECF No. 44.

On February 6, 2016, Mr. Brown timely filed the present petition pursuant to 28 U.S.C.

§ 2255.[1] *See* Pet., ECF No. 46. On April 21, 2016, the government submitted a memorandum in opposition to Mr. Brown's petition. *See* Mem. of Law in Opp'n to Pet'r's Appl., ECF No. 47 ("Gov't Opp'n"). On May 23, 2016, Mr. Brown filed a reply to the government's opposition, *see* Reply to Govt's Mem. in Opp'n, ECF No. 52, and on June 8, 2016, Mr. Brown filed an amended reply, *see* Am. Reply to Govt's Mem. in Opp'n, ECF No. 54. On November 1, 2017, this court stayed all proceedings in this case pending the Supreme Court's decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and the Second Circuit's resolution of the petition for rehearing en banc in *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018). *See* Order, ECF No. 383. I lifted this stay, however, after the Supreme Court's decision in *Dimaya* on April 17, 2018, *see* 138 S. Ct. at 1204, and the Second Circuit's denial of the petition for rehearing in *Hill* on July 24, 2018, *see* No. 14-3872, ECF No. 190.

Mr. Brown seeks to invalidate his convictions under § 18 U.S.C. § 924(c)(1)(A) on the grounds that, following the Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Hobbs Act robbery does not qualify as a crime of violence as defined by that statute. *See* Pet. 4; Mem. of Law in Supp. of Pet'r's Appl. 1-2, ECF No. 46 ("Pet'r Mem. of Law"). The government refutes Mr. Young's argument in its entirety. Gov't Opp'n 1.

DISCUSSION

Section 924(c) makes it a crime if "any person . . . during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or . . . possesses a firearm [in furtherance of any such crime]." 18 U.S.C. § 924(c)(1)(A). This statute defines a "crime of violence" as "a felony" that either (A) "has as an

[1] Mr. Young's petition is timely because it was filed within one year of the date *Johnson v. United States*, 135 S. Ct. 2551 (2015), was decided—June 26, 2015. *See* 28 U.S.C. § 2255(f)(3) (providing that a petition is timely if it is filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court").

element the use, attempted use, or threatened use of physical force against the person or property of another," or (B) "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3). I will refer to § 924(c)(3)(A) as the "force clause" and to § 924(c)(3)(B) as the "residual clause." Mr. Brown was sentenced under § 924(c)(1)(A) for using a firearm in the course of Hobbs Act robbery.

In *Johnson*, the Supreme Court struck down the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e), which contains similar language to the residual clause of § 924(c), as unconstitutionally vague. 135 S. Ct. at 2555-57. Mr. Brown argues that after *Johnson*, Hobbs Act robbery fails to qualify as a crime of violence under § 924(c)'s residual clause because the latter is also unconstitutionally vague. *See* Pet'r Mem. of Law 12-23. Mr. Brown further contends that Hobbs Act robbery is not a crime of violence under § 924(c)'s force clause. *See id.* at 4-12. Thus, Mr. Brown concludes that "[s]ince Hobbs Act Robbery categorically fails to qualify as a 'crime of violence' under section 924(c)'s 'force clause' and since section 924(c)'s residual clause is unconstitutionally vague, no legal[] basis exists for a [section] 924(c) conviction predicated upon H[o]bbs Act Robbery" and thus "[petitioner's] conviction and sentence must be vacated." *Id.* at 28 (citations omitted).

In *United States v. Hill*, the Second Circuit held that Hobbs Act robbery is categorically a crime of violence under § 924(c)'s force clause. 890 F.3d at 56-60 ("Although the question whether Hobbs Act robbery constitutes a crime of violence under the force clause is a matter of first impression in our Circuit, we do not write on a blank slate but against the backdrop of a consistent line of cases from our sister circuits, concluding that Hobbs Act robbery satisfies the force clause. . . . In sum, we agree with all of the circuits to have addressed the issue and hold

that Hobbs Act robbery 'has as an element the use, attempted use, or threatened use of physical force against the person or property of another.'" (citation omitted) (quoting 18 U.S.C. § 924(c)(3)(A))); *see also United States v. Barrett*, No. 14-2641, 2018 WL 4288566, at *1 (2d Cir. Sept. 10, 2018) (holding that defendant's challenge to his § 924(c) convictions predicated on substantive Hobbs Act robberies fails under *Hill*). The Second Circuit's holding in *Hill* provides a clear legal basis for Mr. Brown's § 924(c) conviction, and he is therefore not entitled to relief.[2]

CONCLUSION

For the foregoing reasons, David Brown's § 2255 petition is denied. Further, because he has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), no certificate of appealability shall issue, although Mr. Brown may make such an application to the Second Circuit.

_____/s/_____
Allyne R. Ross
United States District Judge

Dated: September 17, 2018
Brooklyn, New York

[2] Because Hobbs Act robbery is a crime of violence under § 924(c)'s force clause, I need not address the constitutionality of § 924(c)'s residual clause. However, I will note that the Second Circuit's recent decision in *United States v. Barrett* distinguishes § 924(c)'s residual clause from the residual clauses at issue in *Johnson* and *Dimaya*, *see Dimaya*, 138 S. Ct. at 1213 (holding that a "straightforward application" of *Johnson* meant that a similar residual clause defining "crime of violence" in 18 U.S.C. § 16(b) was also unconstitutionally vague). The Second Circuit reasoned that § 924(c)'s residual clause does not present the same constitutional vagueness concerns because a "conduct-specific, rather than categorical, approach to § 924(c)(3)(B) is appropriate." *Barrett*, 2018 WL 4288566, at *1; *see also id.* at *12 ("Section 924(c)(3) . . . is not concerned with prior convictions. It pertains only to § 924(c)(1) crimes of pending prosecution. This means that a conduct-specific identification of a predicate offense as a crime of violence can be made without raising either of the constitutional concerns that have informed the Supreme Court's categorical-approach jurisprudence. The Sixth Amendment concern is avoided because the trial jury, in deciding whether a defendant is guilty of using a firearm 'during and in relation to any crime of violence,' 18 U.S.C. § 924(c)(1)(A), can decide whether the charged predicate offense is a crime of violence as defined in § 924(c)(3)(B).").